No. 82551-3
No. 82577-7

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU HEALTHCARE 775NW,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE,

Respondent.

SEIU LOCAL 925,

Petitioner,

v.

GOVERNOR CHRISTINE GREGOIRE,

Respondent.

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITY

Dmitri Iglitzin, WSBA No.17673
Robert H. Lavitt, WSBA No. 27758
SCHWERIN CAMPBELL BARNARD
IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
(206) 285-2828
Attorneys for SEIU Healthcare 775NW & SEIU Local 925

Judith Krebs, WSBA No. 31825
SEIU Healthcare 775NW
33615 1st Way S., Suite A
Federal Way, WA 98003
(253) 815-3746

Attorney for SEIU Healthcare 775NW

Petitioners submit this Statement of Additional Authority to address the issue identified in Petitioners' opening briefs: Should this Court issue a writ of mandamus ordering Governor Christine Gregoire to immediately withdraw her current budget request and submit a revised 2009-2011 biennial budget request to the Legislature that includes a request for funds necessary to implement the compensation and benefit provisions of the collective bargaining agreements between Petitioners and the State, entered into under RCW 41.56.028 and RCW 74.39A.270 and 74.39A.300?

The additional authority consists of a hearing examiner decision from the Public Employment Relations Commission, *Washington State Patrol Troopers Association, v. State - Office of the Governor,* Decision No. 10313 (PECB)(February 26, 2009). A copy of this decision is enclosed herewith.

//

//

//

//

//

//

RESPECTFULLY SUBMITTED this 27th day of February 2009.

s/Robert H. Lavitt
Dmitri Iglitzin, WSBA #17673
Robert H. Lavitt, WSBA #27758
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
(206) 285-2828
Attorneys for SEIU Healthcare 775NW and SEIU Local 925

Judith Krebs, WSBA #31825
SEIU Healthcare 775NW
33615 1st Way S.
Federal Way, WA 98003
(253) 815-3746

Attorney for SEIU Healthcare 775NW

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2009, I caused Petitioner's Statement of Additional Authority to be filed with the Washington State Supreme Court via email to Supreme@courts.wa.gov. Per agreement of counsel I caused the same to be served via email and same day US First Class Mail to the following:

Stewart Johnston
Senior Counsel
PO Box 40145
Olympia, WA 98504-0145

stewartj@atg.wa.gov

Janetta A. Sheehan
Assistant Attorney General
Labor and Personnel Division
PO Box 40145
Olympia, WA 98504-0145

janettas@atg.wa.gov

Maureen A. Hart
Solicitor General
PO Box 40100
Olympia, WA 98504-0100

marnieh@atg.wa.gov

s/ Robert H.Lavitt
Robert H. Lavitt

State - Office of the Governor, Decision 10313 (PECB, 2009)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE PATROL TROOPERS ASSOCIATION, Complainant, vs. STATE - OFFICE OF THE GOVERNOR, Respondent.	CASE 22171-U-09-5654 DECISION 10313 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Aitchison & Vick, by Jeffrey Julius, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by Morgan Damerow, Assistant Attorney General, for the employer.

On January 2, 2009, the Washington State Patrol Troopers Association (union) filed an unfair labor practice complaint against the State of Washington (employer). The complaint alleges that Governor Christine Gregoire (Governor) failed to submit a request to the Legislature for the funds necessary to implement wage increases awarded by an interest arbitrator. In failing to do so, the union alleges the employer refused to engage in collective bargaining and interfered with employee rights in violation of RCW 41.56.140(4) and (1). The Commission appointed Jamie L. Siegel as the Examiner. The union filed a motion for summary judgment and the parties submitted briefs, the last of which was filed on February 20, 2009.

ISSUES

1. Are there disputed issues of material fact that prevent granting summary judgment?

2. Did the employer refuse to bargain in violation of RCW 41.56.140(4) and (1) when the Governor failed to submit a request to the Legislature for the funds necessary to implement wage increases awarded by an interest arbitrator?

After fully considering the parties' briefs, supporting declarations, exhibits, and the applicable law, I grant the union's motion for summary judgment. The parties do not dispute any material facts and the union is entitled to judgment as a matter of law. The employer committed a refusal to bargain violation when the Governor failed to submit a request to the Legislature for the funds necessary to implement wage increases awarded by an interest arbitrator.

ISSUE 1 - MOTION FOR SUMMARY JUDGMENT

APPLICABLE LEGAL STANDARDS

The law authorizes the Commission and its examiners to grant a motion for summary judgment "if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135. The courts and the Commission define a material fact as one upon which the outcome of the litigation depends. Clements v. Travelers Indem. Co., 121 Wn.2d 243 (1993); State - General Administration, Decision 8087-B (PSRA, 2004). The Commission does not grant summary judgment motions lightly since doing so involves making a final determination without the benefit of a hearing. City of Orting, Decision 7959-A (PECB, 2003). A summary judgment is only granted where the party responding to the motion cannot or does not deny any material facts alleged by the party making the motion.

In ruling on a motion for summary judgment, the Commission must consider the material evidence and all reasonable inferences most favorably to the nonmoving party and deny the motion if reasonable people might reach different conclusions as to the facts. Wood v. City of Seattle, 57 Wn.2d 469 (1960).

ANALYSIS

The employer does not deny any material facts. Neither the employer's answer to the complaint nor the employer's brief raises any factual issues. Rather than disagreeing on factual issues, the parties interpret the law differently. As a result, I find that a hearing is unnecessary and I will decide this case as a matter of law based upon the undisputed facts.

ISSUE 2 - REFUSAL TO BARGAIN

APPLICABLE LEGAL STANDARDS

Under Chapter 41.56 RCW, a public employer has a duty to bargain with the exclusive bargaining representative of its employees over wages, hours, and working conditions. RCW 41.56.030(4). An employer that fails or refuses to bargain in good faith on a mandatory subject of bargaining commits an unfair labor practice. RCW 41.56.140(4).

The union represents troopers and sergeants of the Washington State Patrol (state patrol). Under RCW 41.56.473, those employees are uniformed personnel. Chapter 41.56 RCW defines some key aspects of the collective bargaining process for uniformed personnel. If an employer and union representing uniformed personnel do not reach agreement on the terms of a collective bargaining agreement through negotiations or mediation, interest arbitration is used to determine the terms of the agreement between the parties. The Legislature granted interest arbitration to uniformed employees, recognizing that:

> [T]here exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should

> exist an effective and adequate alternative means of settling disputes.

RCW 41.56.430.

Interest arbitration represents a continuation of the collective bargaining process and a continuation of the obligation to bargain in good faith. City of Bellevue, Decision 3085-A (PECB, 1989), aff'd, 119 Wn.2d 373 (1992).

RCW 41.56.475 is applicable to uniformed personnel of the state patrol. That statute and WAC 391-55-200 et seq., sets forth a detailed process with time lines for selecting an interest arbitrator or panel, scheduling the hearing, and other related matters. After the arbitrator has held the hearing and issued his or her decision, RCW 41.56.473(5) describes the next step in the process as follows:

> The governor shall submit a request for funds necessary to implement the wage and wage-related matters in the collective bargaining agreement or for legislation necessary to implement the agreement. Requests for funds necessary to implement the provisions of bargaining agreements may not be submitted to the legislature by the governor unless such requests:
>
> (a) Have been submitted to the director of financial management by October 1st before the legislative session at which the requests are to be considered; and
>
> (b) Have been certified by the director of financial management as being feasible financially for the state or reflects the decision of an arbitration panel reached under RCW 41.56.475.

Chapter 41.56 RCW distinguishes between how the Legislature treats interest arbitration awards involving uniformed personnel of the state patrol and how local government employers treat interest arbitration awards involving other uniformed personnel. RCW 41.56.475(3), applicable only to uniformed personnel of the state patrol, provides that interest arbitration awards are not binding on the Legislature and that:

> [I]f the legislature does not approve the funds necessary to implement provisions pertaining to wages and wage-related matters of an arbitrated collective bargaining agreement, [the award] is not binding on the state or the Washington state patrol.

Chapter 41.56 RCW does not, however, require local government employers for uniformed personnel to approve funds to implement interest arbitration awards; those awards are final and binding.

ANALYSIS

The Washington State Patrol (state patrol) is an agency of the State of Washington (employer). The union represents a bargaining unit of the state patrol's commissioned employees through the rank of sergeant. The unit includes troopers and sergeants. The employer and union are parties to a collective bargaining agreement effective from July 1, 2007, through June 30, 2009. Consistent with RCW 41.56.473(2), the Governor designated the State Office of Financial

Management's (OFM) Labor Relations Office (LRO) as her representative to negotiate a successor agreement. The employer and union engaged in collective bargaining for a successor agreement but did not reach agreement on all issues. After the parties participated in mediation and did not reach an agreement, the Commission's Executive Director certified the unresolved issues for interest arbitration.

Interest Arbitrator Howell Lankford (arbitrator) conducted a hearing and issued his Findings, Discussion and Award on September 25, 2008. The arbitrator's award included wage increases effective July 1, 2009, January 1, 2010, July 1, 2010, and January 1, 2011.

When the Governor submitted her budget for the July 1, 2009, through June 30, 2011, biennium to the Legislature, she did not include a request for the funds necessary to implement the wage increases awarded by the arbitrator.

Union Not Seeking Writ of Mandamus

The employer frames much of its defense within the argument that the union seeks "in essence," a writ of mandamus and that the union fails to satisfy the requirements for mandamus. The employer's argument fails. RCW 7.16.160 limits the issuance of writs of mandamus to certain courts. The Commission is not charged with granting writs of mandamus. Furthermore, the union does not seek a writ of mandamus with the Commission; the union does not seek a remedy that lies only through a writ of mandamus.(fn:1)

---

fn:1 In Wash. State Council of City & County Employees Council 2 v. Hahn, 151 Wn.2d 163 (2004), one of the cases the employer cites, Council 2 petitioned for a writ of mandamus directing the public employer to engage in collective bargaining. The Washington State Supreme Court rejected the petition, holding that Council 2 possessed an adequate remedy at law under Chapter 41.56 RCW.

The union has filed an unfair labor practice complaint with the Commission. RCW 41.56.160 directs the Commission to prevent unfair labor practices. The law also directs the Commission to issue appropriate remedial orders, including requiring those found to have committed unfair labor practices to cease and desist from such actions and to take affirmative action to effectuate the purposes and policy of Chapter 41.56 RCW. This is precisely what the union seeks in this case.

The Meaning of RCW 41.56.473(5)

Within its mandamus argument, the employer engages in a statutory construction analysis of RCW 41.56.473(5), concluding that the law does not require the Governor to submit a request to the Legislature for funds to implement the arbitration award. It is neither necessary nor appropriate to engage in a statutory construction analysis in this case. When interpreting a statute the Commission administers, the Commission gives the statute its plain and ordinary meaning unless the statute is ambiguous. State - Transportation, Decision 8317-B (PSRA, 2005). It is only when a statute is ambiguous that rules of statutory construction and legislative history come into play. Vancouver School District (Vancouver Education Association), Decision 9959, aff'd, Decision 9959-A (EDUC, 2008). The Commission finds a statute ambiguous when it is subject to more than one reasonable interpretation. Central Washington

University, Decision 8127-A (FCBA, 2004).

Recently the Washington State Supreme Court reinforced these principles in Delyria v. State, Docket No 80602-1 (01/29/2009), as follows:

> The court's fundamental objective is to ascertain and carry out the legislature's intent. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. We determine the plain meaning of a statutory provision based on the statutory language and, if necessary, in the context of related statutes which disclose legislative intent about the provision in question. If the statutory language is clear, our inquiry ends. However, if after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids of statutory construction, including legislative history. (Citation omitted)

In this case, RCW 41.56.473(5) is clear on its face. Its meaning demonstrates no ambiguity and it is not susceptible to more than one reasonable meaning. Provided certain conditions are met, the Governor "shall submit a request for funds necessary to implement the wage and wage-related matters in the collective bargaining agreement or for legislation necessary to implement the agreement." The conditions in this case include (1) submitting a request to the director of OFM by October 1, 2008, and (2) reflecting the decision of an arbitration panel under RCW 41.56.475.

The parties met these conditions. The Legislature does not subject arbitration awards issued under RCW 41.56.475 to a requirement that the director of OFM certify the award as being feasible financially for the state.(fn:2)

---

fn:2 See, for example, RCW 41.80.010(3)(b) which requires certification of financial feasibility.

The law clearly and unequivocally obligated the Governor to request the funds necessary to implement the wage increases awarded by the arbitrator. This required action constitutes a key part of the statutory collective bargaining process. The Governor's failure to comply with the requirement constitutes a refusal to bargain.

"Shall" Used in Mandatory Sense

Despite the fact that RCW 41.56.473(5) is clear on its face and statutory construction is unwarranted, I will briefly address the employer's argument concerning the word "shall." Within the framework of its writ of mandamus argument, the employer states that "in the context of RCW 41.56.473, the Legislature employed the word 'shall' in a permissive sense."

In essence, the employer argues that the requirement of RCW 41.56.473(5), that the Governor submit a request for funds to implement arbitration awards, cannot be reconciled with Chapter 43.88 RCW which contemplates the Governor exercising broad authority in developing the budget. The employer articulates concern that if RCW 41.56.473(5) imposes a mandatory obligation on the Governor, she will be compelled to submit a budget to the Legislature that is based upon financial information that underestimates the revenue

deficit,(fn:3) which does not reflect her spending priorities, and which is not financially feasible.

---

fn:3 It is undisputed that Washington State's economy has worsened since the parties began negotiations. The economic forecast used in the interest arbitration hearing showed a smaller deficit than existed at the time the Governor submitted her budget to the Legislature. Since the Governor submitted her budget to the Legislature, the estimated budget deficit has grown even larger.

The argument that the statute's use of "shall" is permissive is without merit. In Erection Company v. Department of Labor and Industries, 121 Wn.2d 513 (1993), the Washington State Supreme Court explained:

> The court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty. The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent. (Citations omitted)

Nothing in RCW 41.56.473 or Chapter 41.56 RCW suggests the Legislature intended "shall" to convey anything other than a mandatory obligation. Provisions within Chapter 41.56 RCW include the word "may" in addition to "shall," demonstrating that the Legislature draws a distinction between mandatory and discretionary provisions.

Furthermore, RCW 41.56.905 directs: "Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control."

Business Necessity, Changed Circumstance Not Applicable
The employer raises business necessity and changed circumstances as reasons why the Governor was not required to submit a request for funds necessary to implement the wage increases included in the arbitrator's award. Neither defense applies in this case.

Business necessity may serve as an affirmative defense to a party's unilateral implementation of a mandatory subject of bargaining. City of Tukwila, Decision 9691-A (PECB, 2008). Here, the union does not claim unilateral implementation and the business necessity defense is not applicable.

The employer also raises a changed circumstances defense, likening this case to a situation where a party withdraws a tentative agreement or a bargaining proposal due to changed economic circumstances. This comparison fails. This matter does not present a case of regressive bargaining. Instead, this case involves the employer's failure to satisfy a mandatory step in a statutory collective bargaining process.

CONCLUSION

I find that RCW 41.56.473(5) requires the Governor, as part of the bargaining process set forth by the Legislature, to submit a request

for funds necessary to implement the wage increases awarded by the arbitrator. The Governor's failure to do so constitutes an employer refusal to bargain violation. To remedy this unfair labor practice, the Order includes a requirement that the Governor submit a supplemental budget to the Legislature requesting the funds necessary to implement the wage increases awarded by the arbitrator. The Order places no obligation on the Legislature. The Order simply allows the Legislature the opportunity, consistent with RCW 41.56.475(3), to make a decision whether to fund the interest arbitration award.

FINDINGS OF FACT

1. The State of Washington is a public employer within the meaning of RCW 41.56.030(1) and .473. The Washington State Patrol is an agency of the State of Washington.

2. Christine Gregoire is the Governor of the State of Washington and she or her designee represents the State of Washington for purposes of bargaining under RCW 41.56.473(2).

3. The Governor designated the Office of Financial Management's Labor Relations Office to represent her and the state for purposes of bargaining under RCW 41.56.473(2).

4. The Washington State Patrol Troopers Association (union) is a bargaining representative under RCW 41.56.030(3) and represents all commissioned employees of the state patrol through the rank of sergeant.

5. The employer and union are parties to a collective bargaining agreement effective from July 1, 2007, through June 30, 2009.

6. The parties engaged in collective bargaining for a successor collective bargaining agreement but did not reach agreement. They proceeded to mediation and then to interest arbitration.
7. Interest Arbitrator Howell Lankford conducted a hearing. On September 25, 2008, he issued his Findings, Discussion and Award which included wage increases effective July 1, 2009, January 1, 2010, July 1, 2010, and January 1, 2011.

8. In her budget submitted to the Legislature, Governor Gregoire did not submit a request for the funds necessary to implement the wage increases awarded by the arbitrator.

9. The parties presented no disputed facts.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. No genuine issue of material fact exists and, under WAC 10-08-135, the union's motion for summary judgment is granted.

3. By failing under RCW 41.56.473(5) to submit a request to the Legislature for the funds necessary to implement the wage increases awarded by the interest arbitrator as described in findings of fact 7 and 8, the Governor and the State of Washington refused to bargain and violated RCW 41.56.140(4) and

(1).

ORDER

The OFFICE OF THE GOVERNOR shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Refusing to engage in collective bargaining.

   b. Failing to fulfill its statutory obligations under RCW 41.56.473(5) that the Governor submit a request to the Legislature for funds necessary to implement the wage increases included in Howell Lankford's interest arbitration award.

   c. In any other manner interfering with, restraining or coercing its employees in the exercise of their collective bargaining rights under the laws of the state of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

   a. Within twenty days following the date of issuance of this Order, Governor Gregoire shall submit to the Legislature a supplemental budget for the July 1, 2009, through June 30, 2011, biennium that includes the funds necessary to implement the wage increases awarded by Howell Lankford in his Findings, Discussion and Award issued on September 25, 2008.

   b. Post copies of the notice provided by the Compliance Officer of the Public Employment Relations Commission in conspicuous places on the premises of the State Patrol where notices to all bargaining unit members located throughout the state are usually posted. These notices shall be duly signed by an authorized representative of the respondent, and shall remain posted for 60 consecutive days from the date of initial posting. The respondent shall take reasonable steps to ensure that such notices are not removed, altered, defaced, or covered by other material.

   c. Notify the complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the complainant with a signed copy of the notice provided by the Compliance Officer.

   d. Notify the Compliance Officer of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the Compliance Officer with a signed copy of the notice.

ISSUED at Olympia, Washington, this 26th day of February, 2009.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

JAMIE L. SIEGEL, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

CASE 22171-U-09-5654
DECISION 10313 - PECB

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

TO EMPLOYEES

THE WASHINGTON PUBLIC EMPLOYMENT RELATIONS COMMISSION CONDUCTED A LEGAL PROCEEDING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION RULED THAT THE OFFICE OF THE GOVERNOR COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF STATE COLLECTIVE BARGAINING LAWS:

WE UNLAWFULLY refused to bargain when the Governor did not submit a request to the Legislature for funds necessary to implement the wage increases included in Howell Lankford's interest arbitration award.

TO REMEDY OUR UNFAIR LABOR PRACTICES:

WE WILL fulfill our statutory obligations under RCW 41.56.473(5) and within twenty days following the date of issuance of the order in this case, Governor Gregoire shall submit to the Legislature a request for funds necessary to implement the wage increases awarded by the arbitrator.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DO NOT POST OR PUBLICLY READ THIS NOTICE.

AN OFFICIAL NOTICE FOR POSTING
WILL BE PROVIDED BY THE COMPLIANCE OFFICER.

The full decision is published on PERC's website, www.perc.wa.gov.